IN THE

Supreme Court of the United States

No. 78-938

OCTOBER TERM 1978

ALEXANDER ROSATO,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

CASES CITED

OTHER AUTHORITIES

IN THE
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NO. .....

OCTOBER TERM 1978

ALEXANDER ROSATO,
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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT:

The petitioner, Alexander Rosato, prays that a writ of certiorari issue to review a final judgment and order of the United States Court of Appeals for the Second Circuit, entered August 17, 1978 (Appendix A, *infra*) which affirmed the judgment of the United States District Court Eastern District of New York, entered on January 27, 1978, convicting him, after a jury trial of two of four counts of an income tax indictment. Counts one and three charged Rosato with attempted evasion of his 1970 and 1971 Federal income tax by failing to report interest income of $14,400 and $6,700 respectively (Title 26 U.S.C. 7201). Counts two and four charged that when filing his

1970 and 1971 Federal income tax returns Rosato knowingly made a false statement with respect to a material matter by understating his income by a substantial amount (Title 26 U.S.C. 7206(1)).

Rosato was found guilty on counts three and four pertaining to the year 1971 and acquitted on counts one and two. As a consequence, petitioner was sentenced to two years probation, plus a $5,000 fine. The United States Court of Appeals for the Second Circuit refused a petition for rehearing or rehearing en banc by a decision rendered November 13, 1978. (Appendix B *infra*).

THE OPINION OF THE COURT BELOW:

The opinion of the Court below namely the United States Court of Appeals for the Second Circuit, affirming the judgment of conviction is set forth in Appendix A, *infra*, as aforesaid.

JURISDICTION

The order of the judgment of the United States Court of Appeals for the Second Circuit, the Court below, is dated August 17, 1978 and its refusal of a petition for rehearing or rehearing en banc is dated November 13, 1978. The jurisdiction of this Court is invoked, made and conferred under 28 U.S.C. 1254(1).

QUESTIONS INVOLVED

A. Motion for directed verdict of acquittal pursuant to Rule 29, should have been granted.

B. Courts ruling barring examination of present Internal Revenue Service positions effect on the year 1972

deprived defendant of a fair trial (546-548).

C. Prosecutor's summation deprived the defendant of a fair trial.

D. Agent's pervasive testimony rendered it useless and Court should have ordered testimony stricken so as to avoid confusion and prejudice.

THE PRINCIPAL CONSTITUTION AND STATUTORY PROVISIONS INVOLVED:

Fifth Amendment to the Federal Constitution, in part:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . .; . . . nor be deprived of life, liberty or property without due process of law; . . . ."

Sims v. Rives, 1936, 84 F2d 871 cert. den. 298 U.S. 682:

> "Constitutional guaranty that no person shall be deprived of life, liberty or property, without due process of law implies equal protection of laws."

Title 26 U.S.C.§7201. Attempt to evade or defeat tax:

> "Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony, and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution."

Title 26 U.S.C. §7206. Fraud and false statements:

> "(1) Any person who willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter shall be

fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution."

STATEMENT OF THE CASE

The Government's case against Rosato for these years rested primarily on the testimony of Edmond Graifer, an admitted "con-man," loan shark and perjurer who defrauded New Jersey banks of over a million dollars (29, 85, 100). He testified that on or about February 2, 1970 he borrowed $30,000 from the defendant to expand his personal loan shark business (35). For this he paid the defendant 1% interest, i.e., $300.00 a week until May 5, 1971 when he reduced the amount owed to the defendant by paying him $5,000 (39). Subsequently, he paid the defendant $250.00 a week (52). Thus in 1970 Rosato received $14,000 and $18,800 (includes the $5,000) in 1971 from Graifer. Graifer further testified that an additional $50,000 in 1971 was loaned to him by Rosato without interest (114, 115), of which $40,000 was estimated to be unpaid (155). He also stated that no payments to Rosato had been made since June 1972 (38) and that he never claimed interest deductions for these amounts paid to Rosato (117).

There was further testimony from one Anthony French that he received a $10,000 loan from the defendant sometime between September and November 1971, for which he paid the defendant 2% interest, i.e., $200.00 a week. French testified that he did not care whether Rosato applied these payments to interest or principal (231-233). Further, that apparently he fell behind in his payments in the fall of 1972 and after 1973 no payments were made to Rosato.

There was further testimony that Rosato allegedly received a $2,500 finders fee in 1971 (50-51).

The Government in its tax computations for 1971 charged the defendant, who is on a cash basis for reporting income, with interest income from Graifer of $13,800, French $2,000, added the finders fee of $2,500 to come to a total of $18,300 which the defendant allegedly should have reported as miscellaneous income rather than the $11,600 reflected on the return. If it is appropriate to deem that payments could be properly applied to principal rather than interest, no additional income results from these transactions in 1971.

William Davidson, an Internal Revenue Agent and the Government's expert witness, testified that the taxpayer was in the business of making loans (495); that with regard to repayments of a debt that the debtor has the first option to treat payments as interest rather than principal and if no election is made by the debtor the creditor has the next option, but if no election is made, it is the Government's position that payments are applied to interest first (499); that under the facts in this case the debtor had no election to make since he could not claim the interest expense deduction on his return (536) and that usurious interest loans or contracts are speculative (551).

Joseph Gallo, defendant's expert witness, a CPA and former Agent employed by the Internal Revenue Service for 10 years, corroborated Davidson's evaluation of these loans as being speculative and that income derived from these loans would result in no additional recognizable taxable income in the year 1971 due to the proper election by the taxpayer in applying payments first to principal rather than interest (596).

REASONS FOR GRANTING THE WRIT:

A. MOTION FOR DIRECTED VERDICT OF ACQUITTAL PURSUANT TO RULE 29 SHOULD HAVE BEEN GRANTED.

To sustain a conviction of willfully attempting to evade income tax liability, the Government must prove existence of a tax deficiency, willfullness and an affirmative act constituting evasion or an attempted evasion of the tax. *U.S. v. V. Cales* (CA-5, 1973) 482 F2d 1155. Thus to convict one of attempted income tax evasion, it must be shown that he committed some overt act or acts as part of his attempt to evade or defeat tax. It is well settled that the Government has the burden of proving each essential element of the crime. *Tot v. U.S.*, 319 U.S. 463 (1943). The determination of criminal liability not civil liability is at stake in the extant situation.

The Government has the burden of proving guilt beyond a reasonable doubt with respect to every element of the crime. Thus, with regard to the existence of a tax deficiency in a criminal case, if the law relied on by the Government to include an alleged omitted amount as income is not absolute, the requisite intent to evade and defeat tax must be deemed to be missing. Willfulness means "a state of mind of taxpayer, wherein he is fully aware of the existence of a tax obligation to the Government which he seeks to conceal." *U.S. v. Martell,* 199 F2d 670 cert. den. 345 U.S. 917. In *U.S. v. Critzer* (CA-4, 1974), 498 F2d 1160, taxpayer's conviction was reversed due to the fact that the law was so vague and uncertain with regard as to whether rental income from tax exempt land is taxable, the requisite intent to evade and defeat taxes was compelled to be deemed missing.

Viewing the evidence in the best light for the Government, Rosato loaned money to Graifer, who admittedly told the former that he was going to place the money in the street as a loan shark and $10,000 to Anthony French, involved in construction enterprises, whose business enterprises had gone bankrupt just prior thereto (222). French could not acquire loans in the normal course of business. Being conservative, the prospects of repayments were tenuous to say the least. Neither party specifically informed the defendant that the payments were to be applied to interest and in point of fact, French specifically stated that he did not care how the defendant applied his payments. Thus there was apparently no characterization by the debtors as to how these payments were to be applied.

Interest is the price paid per unit of time for the use of money or for creditor's forbearance in demanding payment. *Rev. Rul. 72-458,* CB 72-2, 514; *Deputy v. DuPont,* (1940), 308 U.S. 488. There must be a bona fide debt on which the interest is paid. *Taylor v. Commissioner,* 27 T.C. 361.

Editorially, Commerce Clearing House, a tax publication used by Internal Revenue Service personnel (478) states:

> "The matter of applying payments received on a loan toward reduction of the principal or toward interest generally concerns only the parties involved. On the accrual basis, interest accrues ratably, regardless of how payment is made. On the cash basis, however, the parties may agree how payments are to be applied. In the absence of an agreement, the debtor has the right to specify how the payments are to be applied. If the debtor makes no allocation, the creditor may do so."

In *C.B. Brown v. Commissioner,* 37 T.C. 461 aff'd on another issue 380 U.S. 563, it was stated:

"Taxpayer could treat the payments as applying to principal rather than interest in the absence of any directions by the payor as to the application of the payments."

Board of Appeals defines "debt" as a specific sum of money which is due and owing from one person to another, and denotes not only the obligation of the debtor to pay but the right of the creditor to receive and enforce payment. *J.S. Collinan v. Commissioner,* 19 BTA 930, 932 (1930).

G.O.L. Section 5-511 of the State of New York provides that all usurious contracts are void. G.O.L. Section 5-513 provides for the recovery of payments made in excess of the legal rate of interest.

From the foregoing authorities it is clear that the loans in question are void and unenforceable at all times and that a debt was never created. See *Tharp v. Commissioner,* TCM 72-10, *National Equipment Rental, Ltd. v. Hendrix* (CA-2, Decided Nov. 11, 1977). As was stated in *Gregory v. Helvering,* 308 U.S. 355 (1939), "The legal right of a taxpayer to decrease the amount of what otherwise would be his taxes, or altogether avoid them, by means which the law permits cannot be doubted."

The Court rulings allowing taxpayers to apply payments to principal rather than interest are irrefutable. Moreover, if a creditor's method of recording collections is to apply the money collected to principal until the entire principal was paid and then to apply further collections to interest, no part of collections is interest until principal is received. *Blackwell,* 15 TCM 962.

Thus the taxpayer entered into a transaction for profit, income from which is not recognized until costs are recovered.

It should be noted that the fact that a party treats a payment as interest may be relevant but is not decisive. *Elliott Paint & Varnish Co. v. Commissioner,* 44 BTA 241 (1941). The Treasury says that taxpayer's books may be kept on a different basis than the returns. Rev. Rul. 68-35 CB 68-1, 190.

Assuming arguendo that this Court in spite of the precedent set above, decides that repayments received by the defendant are to be considered to be interest, then the rationale as expressed by the Courts in *Phillip v. Frank,* 295 F2d 629 rev'g 185 F Supp. 349 (CA-9, 1961) and *Lifton v. Commissioner,* 36 T.C. 909 (1961) aff'd 317 F2d 234 should be noted wherein it was related that if a speculative venture is entered and there is no reasonable certainty of the contributed funds being collected in full, no payments will be considered as income until the entire cost is recovered tax free.

Speculation for these items is an apparent understatement. The defendant due to the laws of the State of New York could not collect on either of these two void loans. There was no marketability in existence or enforceable personal liability.

While it appears that there is no doubt as to the meaning of the above as applied to the facts of this case, should there be any doubt it must be resolved in favor of the taxpayer. See *Porter v. Commissioner,* 288 U.S. 436, 442 (1933). *U.S. v. Meriam,* 263 U.S. 179, 188 (1923) and *Citizens National Bank of Waco v. U.S.,* 551 F2d 832 (1977).

The Fourth and Ninth Circuits Courts of Appeal have defined speculative as "if there is doubt whether the contract will be completely carried out no payments are income until the entire cost is first recovered tax free." *Commissioner v. Lifton, supra, Phillips v. Frank, supra, Willhoit,* T.C.M. 1958-207 rev'd and rem'd 308 F2d 259

which conflicts with the Sixth Circuit Court of Appeals definition of speculative, i.e., "only if the investor can't reasonably expect to get back his cost is his investment speculative enough to warrant possible deferment of income." See *Darby Investment Corp. v. Commissioner,* 315 F2d 551 aff'g 37 T.C. 839.

It is evident that due to the aforementioned uncertainties of if or how the amounts received by Rosato should be reported, that as a matter of law, the defendant cannot be guilty of willfully evading and defeating income tax. As a matter of law the requisite intent to evade and defeat income tax is missing. The obligation to report these payments as income is so problematical that defendant's actual intent is irrelevant. Even if it could be shown that he had consulted the law and sought to guide himself accordingly, he could have had no certainty as to what the law required. See *Amy T. Critzer, supra.*

It should be further noted that neither of the witnesses with regard to the alleged interest income testified to the fact that they specifically told the defendant to apply the payments to interest, nor did they claim any deduction for the amounts repaid to Rosato.

There is sufficient doubt as to the meaning of the provisions of the Internal Revenue Code involved here as applied to the facts of this case and all doubt must be resolved in favor of the taxpayer. *Porter v. Commissioner,* 288 U.S. 436, 442, 53 Ct. 451, 77 L.Ed.880 (1933). It is settled that when the law is vague or highly debatable, a defendant, actually or imputedly, lacks the requisite intent to violate it. In *James v. U.S.,* 336 U.S. 213, 81 S.Ct. 1052, 6 L.Ed.2d 246 (1961) when the Supreme Court decided that embezzled funds were taxable income, it nonetheless reversed James conviction under Code Section 7201. Former Chief Justice Warren in a three justice plurality opinion stated:

> "We believe that the element of willfulness could not be proven in a criminal prosecution for failing to include embezzled funds in gross income in the year of misappropriation so long as the statute, contained the gloss placed upon it by Wilcox at the time the alleged crime was committed."

Justice Black and Douglas agreed with the decision further stating:

> ". . . . a criminal statute that is so ambiguous in scope that an interpretation of it brings totally unexpected results, thereby subjecting people to penalties and punishments for conduct which they could not know was criminal under existing law raises serious questions of unconstitutional vagueness 366 U.S. at 224."

In civil fraud and criminal cases, the Courts ruled that the uncertainty created by Wilcox as a matter of law precluded a demonstration of willfulness, without regard to the defendant's actual state of mind with respect to his knowledge or reliance on Wilcox. See *Kahr v. Commissioner,* 414 F2d 621 (2 Cir. 1969).

The Supreme Court in its recent decision with regard to withholding tax on employee meal reimbursements, *Central Illinois Public Service Co. v. U.S.* (February 28, 1978), 46 U.S.L.W. 4163, stated that prior to an employer being liable for the civil liability for withholding tax the obligation to withhold must be "precise and not speculative."

In the extant situation where the Government's burden of proof is much greater, the United States argues that the payments were interest, since the weekly payments in no way diminished the amount originally owed, a conclusion which must be rejected by this Court.

As was stated in *U.S. v. U.S. Gypsum Co.*, Sup. Ct. 76-1560 (June 29, 1978) with regard to the Sherman Anti-Trust Act, which would be equally applicable here "that criminal process should be used only where the law is clear and the facts reveal a flagrant offense and plain intent . . . . " Further " * * * that the criminal provisions of the act should be reserved for those circumstances where the law was relatively clear and the conduct egregious." It is obvious that the defendant was not consciously behaving in a way the Internal Revenue Code prohibits and his conduct herein is not a fitting object of criminal punishment for violation of the Internal Revenue Code.

It appears to be particularly inappropriate for the Government, absent exact authority that the obligation to report these amounts received by the defendant in 1971 were precise and not conjectural, to proceed against a taxpayer in a criminal case. The judicial decisions indicate that it is acceptable and appropriate not to report the amounts received as income until principal is recovered. In order for the defendant to have notice, which is legally meaningful, that these amounts must be reported as income, explicitness, lacking here, to inform a reasonably prudent person of the legal consequences of failure to comply with this Internal Revenue Service interpretation of the law must be precise. In view of the complexities of Federal taxation, fundamental fairness should prompt the Government to refrain from attempting to criminally prosecute with regard to an item that is speculative or lacks a clear congressional mandate that it must be reported as income.

The standard of "proof beyond a reasonable doubt" is constitutionally mandated for elements of a criminal offense. Due process commands that no man shall lose his liberty unless the Government has borne the burden of

convincing the fact finder of his guilt. It is critical that the moral force of the common law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. If quantified, the beyond a reasonable doubt might be in the range of more than 95% probable. *U.S. v. Schipani,* 289 F.Supp. 43, 57 (E.D.N.Y. 1968) aff'd 414 F2d 1262 (2nd Cir. 1969).

Based on the taxpayers method of reporting payments received, no information pertaining thereto was necessary or required to be disclosed on the return. It is conceded that omitted items may be material where reporting is necessary in order that the taxpayer estimate and compute his tax correctly. That is not the situation herein and thus the return and evidence failed to substantiate any indicia of falsity with regard to the information on this return. Thus the motion for a directed verdict of acquittal pursuant to Rule 29 should have been granted (568).

B. COURTS RULING BARRING EXAMINATION OF PRESENT INTERNAL REVENUE SERVICE POSITIONS EFFECT ON THE YEAR 1972 DEPRIVED DEFENDANT OF A FAIR TRIAL (546-548)

The income tax effect of Rosato's proper method of reporting these payments is as follows:

	Return of Principal			*Income*	*Loss*
	1970	*1971*	*1972*	*1971*	*1972*
Graifer	$14,400	15,600		3,200	0
French		2,000	8,000		

The Government's theory, solely due to its reformation of how it deems the aforementioned payments should

be allocated, results in the following tax effect:

	Interest			*Principal*	*Loss*
	1970	*1971*	*1972*	*1971*	*1972*
Graifer	$14,400	13,800		5,000	30,000
French		2,000	8,000		10,000

Moreover, the $50,000 personal loan to Graifer, $40,000 of which was admittedly not repaid, would also probably be qualified as an ordinary loss in 1972. See IRC Section 165 and *Herbert & Virginia Tharp v. Commissioner, supra.*

Thus, the relevancy and materiality of the tax consequences in 1972 of the correlative adjustments required by the Government's reallocation of payments to interest and principal in 1970 and 1971, was proper, required, material and consequential to the determination of the action as to tax liability. Anytime one transfers income or loss from one year to another, the tax effect on the other year involved affects the ultimate amount of tax liability.

It should be noted that the Internal Revenue Code, i.e., Section 482, dealing with reallocation of income between related parties, requires that if a position is taken by the Government reallocating income and expenses, that the correlative adjustments must be made. Although this Code section is not directly applicable here, its principle would seem to indicate that where appropriate, as reallocating income between years or related parties, a correlative adjustment should be considered or made.

Congress, in its wisdom, fully aware that situations of this type could deprive a taxpayer of correlative adjustments due to the Statute of Limitations, legislated Code Section 1311-1316, which permits this bar to be lifted in favor of either the taxpayer or the Treasury in a

number of special cases where an inconsistent position is maintained. An inconsistent position is a position which is consistent with a prior erroneous inclusion, exclusion, omission, allowance, disallowance, recognition or nonrecognition. Code Section 1311(b)(1). Unequivocally the Internal Revenue Service's present position affects defendant's basis for these loans and would qualify for Code Section 1311-16 if required.

A review of the Senate Finance Committee reports reveals that Congress was concerned about providing an equitable solution to cases in which "an unfair benefit would have been obtained by assuming an inconsistent position and then taking shelter behind the protective barrier of the Statute of Limitations." S.Rep.No. 1567, 75th Congress 3rd Session 49 (1938) reprinted in 39-1 (part 2) CB 79 at 815. This legislation was based upon the principle that disputes as to the year in which income or deductions belong or as to the person who should have the tax burden of income or the tax benefit of deductions, should never result in a double tax or double reduction of tax or an inequitable avoidance of tax.

The Second Circuit in *Yagoda v. Commissioner,* 331 F2d 482 (CA-2, 1964), affirming a Tax Court decision, stated that the mitigation sections are remedial, not punitive, in that they allow for the correction of errors. In *Chertkoff v. Commissioner,* 66 TC No. 50 wherein the service deemed that a long term capital gain item included as income in 1966 should be a dividend in 1965, the Service refunded the tax attributable to the reported 1966 capital gain and issued a deficiency notice for 1965.

In *Yagoda, supra,* the Service, refusing to recognize trusts for wife and daughter being entitled to partnership income, contending that all of the partnership income was taxable to the husband, in deficiency assessments issued to

the husband, allowed credits with regard to the resulting over-assessments of the trusts for consistency.

In the extant situation solely due to the fact that the Service deemed payments to be interest rather than repayment of principal (taxpayer's contention), a deduction resulted for 1972 which apparently more than wipes out the alleged tax deficiency for 1971. Based on this rationale as expressed in *Yagoda* and *Chertkoff, supra,* evidence as to the correlative adjustment was appropriate, material and unquestionably would have affected the outcome of the trial.

The Court relied on the case of *A.C. Willingham v. U.S.A* (CA-5, 1961), 289 F2d 283 aff'g an unreported District Court decision, which is distinguishable from the facts herein, barred the introduction of the proper correlative adjustments created by the Internal Revenue Service position. It should be noted that in *Willingham* the Court stated that "a fortuitous loss in 1955 does not change the intent with which the fraudulent return was filed two years earlier." Nothing occurred here in a subsequent year which was not solely due to the inconsistent position caused by the Internal Revenue Service position.

The Supreme Court in *Bull v. U.S.,* 295 U.S. 247, adopted the theory of recoupment to permit a barred overpayment of estate tax to be offset against income tax liability resulting from the same item. The Second Circuit has held that a refund of income tax upon erroneously included income must be offset by a deficiency in a later year resulting from the correct inclusion of that item. *U.S. v. Drescher,* 179 F2d 863, cert. den. 340 U.S. 321. The reverse position in the extant situation, i.e., deficiency in earlier year offset by overpayment in a subsequent year, was not allowed to be revealed to the jury (547), in spite of the requirements of Code Sections 1311-1316 inclusive.

Thus as can be seen by the intent of Congress in determining tax liability, the totality of circumstances and the effect of adjustments, if applicable to different years, should be considered. Moreover, in the present situation a probable refund would result.

C. PROSECUTOR'S SUMMATION DEPRIVED DEFENDANT OF A FAIR TRIAL.

The prosecutor stated in her summation to the jury:

> "It would have been very nice if I could bring before you a priest or rabbi who observed the defendant making illicit loans, illegal loans, but unfortunately criminals go about their business only in the presence of other criminals, not in the presence of priests or priests or rabbis. (628)."

Defendant did not take the stand and his character is not an issue. The Government alleges that its effect was more than neutralized by the following Court's instruction to the jury:

> "Ladies and Gentlemen:
>
> As I instructed you earlier, the evidence in the case is from the witnesses and from the exhibits. What counsels say to you, what counsels say to you in argument is not evidence.
>
> The remarks by counsel in summation with regard to a general proposition that criminals associate with criminals is certainly not evidence. That is not even common sense.
>
> Accordingly, I instruct you to disregard it and I also remind you that this defendant stands before you with a presumption of innocence and that that presumption stays with that defendant throughbout this argument, throughout the entire trial and continues during your

deliberations.

It is for you to consider all the evidence and in your judgment determine whether beyond a reasonable doubt this defendant has committed a criminal offense, it is for you to make that determination and that determination is not to be made by anyone else and it is not to be considered by you." (629-630)

When an assistant U. S. attorney appears in Court and, especially for a trial before a jury, she represents and personifies the Government, she must prosecute cases diligently and vigorously, but she must also perform her task with dignity and self discipline. Prosecutor's comments in this case did not rise to the level of oratory eloquence. She engaged quite simply in name calling.

It may be that corrective instructions are no more than an empty ritual without any effect on the jurors. Further, verdicts in closely contested criminal cases often find their real spring in the atmosphere generated in and by the trial where things felt but unseen, sometimes real, sometimes illusory, arising out of, but more than, the relevant and admissible evidence, in the end more influence the verdict than does the relevant testimony. See *Ford v. U.S.* (5th Cir. (1954), 210 F2d 313, 317, 318, cert. den. 352 U.S. 833 (1956)). The deep tendency of human nature to punish, not because the defendant is guilty this time, but because he is a bad man and may as well be condemned now that he is caught, is a tendency which cannot fail to operate with any jury in or out of Court.

Under the circumstances herein, in view of the jury's illogical inconsistent verdict, the extreme prejudice caused by this remark probably was the marginal difference between the defendant's conviction and his acquittal on Counts three and four.

D. AGENT'S PERVASIVE TESTIMONY RENDERED IT USELESS AND COURT SHOULD HAVE ORDERED TESTIMONY STRICKEN SO AS TO AVOID CONFUSION AND PREJUDICE.

The Agent testified that the defendant had no option other than to report this as interest (495-496) whereas subsequently (499) he states that there is an option. He erroneously cited Regs. 1.166-1(e) for the proposition that the loan to Doonan could not under any circumstance in this case be deducted (512-513). In one instance he claims the payments under a void agreement to be not deductible to the payor, but then asserts that French (who evidently entered into a usurious contract, void in New York) could claim the deduction (535-538). Moreover, he admitted (551) that the payments from these two persons in issue were made on contracts that could be interpreted as speculative but always maintained the position that these amounts received from Graifer and French must be reported as interest income.

Thus, the confusion and prejudice caused by this testimony rendered it useless. See *U.S. v. Celentano,* 391 F.Supp. 1252 (S.D.N.Y. 1975). Moreover, based on the testimony relative to speculative ventures, a directed verdict of acquittal was mandatory.

CONCLUSION

It is respectfully submitted that this petition for certiorari be granted.

Respectfully submitted,

MURRAY APPLEMAN
Attorney for Petitioner
A Member of the Bar of the
United States Supreme Court

APPENDIX

APPENDIX A

Order and Judgment of United States Court of Appeals for the Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the seventeenth day of August one thousand nine hundred and seventy-eight

Present: HON. ELLSWORTH A. VAN GRAAFEILAND, *Circuit Judge*; HON. JOHN F. DOOLING, HON. ALBERT W. COFFRIN, *District Judges.*

78-1154

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ALEXANDER ROSATO,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern Ditrict of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed in accordance with the Court's oral opinion in open court.

APPENDIX B

Orders Denying Petition for Rehearing and Petition for Rehearing In Banc

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the thirteenth day of November, one thousand nine hundred and seventy-eight.

PRESENT: HON. ELLSWORTH A. VAN GRAAFEILAND, Circuit Judge; HON. JOHN F. DOOLING, HON. ALBERT W. COFFRIN, District Judges.

United States of America,
Plaintiff-Appellee,

v.

Alexander Rosato,
Defendant-Appellant.

78-1154

A petition for a rehearing having been filed herein by counsel for the defendant-appellant, Alexander Rosato,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the thirteenth day of November, one thousand nine hundred and seventy-eight.

United States of America,
Plaintiff-Appellee,

v.

Alexander Rosato,
Defendant-Appellant.

78-1154

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendant-appellant, Alexander Rosato, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

s/IRVING R. KAUFMAN
Chief Judge